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APR 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. ~~584~~ 10

UNITED STATES OF AMERICA, EX REL. WILLIAM H. GIESE,

Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 564

UNITED STATES OF AMERICA, EX REL.
WILLIAM H. GIESE,

Petitioner,

vs.

LIEUT. GENERAL STEVEN J. CHAMBERLIN, COMMANDING GENERAL OF THE FIFTH ARMY, AND COLONEL ALEXANDER H. CUMMINGS, COMMANDING OFFICER, FORT SHERIDAN, ILLINOIS,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM.

In order to maintain some semblance of continuity, we shall reply to respondents' rather desultory "discussion" under the point headings used in our original petition and supporting brief.

I.

THE ISSUANCE, "FOR THE CONVENIENCE OF THE GOVERNMENT RR 1—1 (DEMOBILIZATION)", OF A DISCHARGE CERTIFYING THAT THE RELATOR "IS HEREBY HONORABLY DISCHARGED FROM THE MILITARY SERVICE OF THE UNITED STATES", CONSTITUTED A "FORMAL, FINAL JUDGMENT PASSED BY THE GOVERNMENT UPON HIS ENTIRE MILITARY RECORD", DISCHARGED HIM FROM ALL SUBSISTING ENLISTMENTS AND MADE HIM A CIVILIAN, NO LONGER SUBJECT TO TRIAL BY COURT-MARTIAL FOR ANY OFFENSE (EXCEPT FRAUDS SPECIFIED UNDER ARTICLE OF WAR 94) ALLEGEDLY COMMITTED PRIOR TO SUCH DISCHARGE;

AND,

IN FAILING SO TO HOLD, THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CASE IS NOT ONLY IN CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT IN THE DRAINER CASE BUT WILL, UNLESS REVERSED BY THIS COURT, CAUSE GREATEST CONCERN ON THE PART OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

While the respondents' statements (pp. 7-8) with respect to the effect of Articles of War 28, 107 and 108 upon the *scope* of the relator's 1946 discharge might, at first blush, appear plausible enough, they do *not* accurately reflect *either* the actual provisions or the effect of the Articles of War and pertinent regulations. Before going into details, we deem it necessary first briefly to present the situation

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leading up to and resulting in the discharge of the relator and millions like him from the service during the years 1945-1946.

As the Court doubtless recalls, after our victory in Europe (VE), the Secretary of War, by direction of the President, drew up and, on May 12, 1945, promulgated certain procedures designed to reduce the size of our army by releasing from service first those who most deserved to be released and, after our victory over Japan (VJ), revised and accelerated those procedures **(RR 1—1, "PLAN AND PROCEDURES FOR READJUSTMENT OF MILITARY PERSONNEL.")**[1]

1.
"**RR 1—1** **18 March 1946.**

"**PLAN AND PROCEDURES FOR READJUSTMENT OF MILITARY PERSONNEL.**

"**SECTION I.**

"**GENERAL PRINCIPLES.**

* * * * *

"2. **Separation Criteria.**

"a. On 12 May 1945 the Adjusted Service Rating system, correlating length of service, oversea service, and parenthood, became effective. This system provided a score for individual officers and enlisted personnel and established a priority for release. (For computation of scores see Appendices I and II.)

"b. On 2 September 1945 all scores were recomputed by application of factors and multiples to reflect additions for the period from 12 May 1945 to 2 September 1945. No deductions for any reasons were contemplated with respect to the 12 May 1945 total. The 2 September 1945 score is the critical score.

"c. Critical scores and alternate separation criteria are announced only by the War Department for use in determining eligibility of military personnel for release.

* * * * *

"11. **Separation Authority.**

"These regulations will be cited as authority for separation on records of all military personnel who are separated by virtue of ASR score, length of service, age (except those separated under sec. V, WD Circular 290, as amended by sec. IV, WD Circular 376, 1945), or marriage, or dependent children in the case of WACs and female Medical Department officers; appropriate War Department directives will be cited as authority for separation or

It should be noted that said discharge procedures made *no* distinctions whatsoever between those who had *voluntarily* "*enlisted*" (or had accepted commissions) and those who had *involuntarily* been "*inducted*" ("drafted") into the service and, on the contrary, applied to

"*All* military personnel"

and to

"individual officers and enlisted personnel"

alike and provided for the discharge of all who had "enlisted" or had been "inducted" *except*

"*those who volunteer for retention on duty* or whose retention is *specifically* authorized by War Department directives." (Emphasis added.)

As this Court probably also recalls, the War Department, from time to time during the years 1945-1946, announced certain

"critical ASR scores"

which varied with the different ranks and grades and became progressively *lower* as time went on, thus resulting in the gradual and fairly orderly demobilization of the Army.

It should also be noted that, in and by said RR 1-1 the

---

discharge on records of military personnel who are separated for other reasons.

* * * * *

"**SECTION II.**

"**ENLISTED PERSONNEL.**

* * * * *

"13. **Eligibility for Release.**

"All commanders will, without unnecessary delay, take appropriate action leading to the separation of enlisted personnel made eligible for separation under current War Department criteria, except those who volunteer for retention on duty or whose retention is specifically authorized by War Department directives."

* * * * *".

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authority of the President and of the Secretary of War to discharge any and

"all military personnel"

was delegated down to those commanders who actually carried out the "demobilization" in the field, they being directed that

"these regulations will be cited as authority for separation."

With this background in mind, let us now examine the *details* of respondents' said statements with respect to the effect of Article of War 28, 107 and 108 upon the *scope* of relator's 1946 discharge.

Respondents' **first** statement (p. 7) on this issue is that

"But that discharge related only to his term of service pursuant to his induction in 1944, both by reason of the dates specifically appearing in the discharge, and as a matter of law."

Insofar as the **form** of his said discharge is concerned, it should be kept in mind that, although it did give "16 Mar 44" as the date of his "induction", said certificate also recited that he had

"ASR score (2 Sept 45) 44",

that his discharge was for the

"convenience of the Government RR 1-1 (Demobilization)"

and that he was

"honorably discharged",

not from any particular "enlistment" or "induction" but from

"from the military service of the United States".

Respondents' **next** statement (p. 7) that

> "The legal irrelevance of the 1946 discharge to the earlier 1930 enlistment results from the *prohibition in AW 108* of any but a special type of discharge when the discharge takes place *before the expiration of an enlistment*". (Emphasis added.)

is also *unsound* and *inaccurate* in at least 2 particulars.

In the **first** place, giving the relator credit for all *honorable* service, ("good time") performed by him between March 16, 1930 (when he enlisted, R. 2, 7) and July 2, 1930 (when he went A.W.O.L., R. 3, 7); between October 13, 1942 (when he was "restored" to duty, R. 7) and March 15, 1943 (when he again went A.W.O.L., R. 7); and between March 16, 1944 (when he was inducted, R. 3, 7) and June 29, 1946 (when he was honorably discharged, R. 3, 7); (viz: respectively, 3 months, 16 days; 5 months, 2 days; and 2 years, 3 months, 13 days; or a total of exactly 3 years), **the relator had actually served his three year** (1930) **enlistment in full and,** had there intervened no war "emergency", **would have been discharged in due course on the same day** (June 29, 1946) **on which he was actually discharged.**

In the **second** place, said *AW 108 does not actually prohibit* an *earlier* discharge in *all* events but, on the contrary, says

> "*except by order of the President, the Secretary of War*", (Emphasis added.)

which exception *destroys* the respondents' said contention *because*, in the case at bar, *the relator was in fact discharged*

> "for the convenience of the Government RR 1-1 (Demobilization")

"*by order of the Secretary of War*"

under RR 1-1 (the so-called "point system", heretofore ex-

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plained in detail) which was promulgated by the Secretary of War.

Respondents' **further** statement (p. 7) that

> "Moreover, *AW 107 prevented* the expiration of an enlistment *before* the making up of time lost in desertion," (Emphasis added.)

is also patently unsound, **first**, because, as we have demonstrated, *all "time lost in desertion" had in fact actually been made up by honorable service* as of the date of his *actual* discharge; and, **second** because said *AW 107 does not actually require* that such "bad" time be made up and *only* says that an individual so absenting himself shall

> "be *liable* to serve"

such *additional* time, which provision, in the case at bar, did *not "prevent"* such discharge because, by issuing him an "honorable discharge" on June 29, 1946, from

> "the military service of the United States"

for the

> "convenience of the Government RR 1-1 (Demobilization),"

the Government irrevocably elected *not* to make him

> *"liable"*

to serve further.

The respondents' **further** contention (pp. 7-8) that

> "this time could *not* be deemed made up by the 1944-46 military service, since an *enlistment* by a soldier subject to an existing enlistment 'without having received a regular discharge' is defined in AW 28 as a desertion and the soldier is deemed to have *enlisted* fraudulently". (Emphasis added.)

is also patently unsound in that *this* particular article

(AW 28, respondents' memorandum, footnote, p. 8) relates only to a deserter from one **"enlistment"** (from which, in peacetime, he could, after a year's service, "buy" himself out for a certain sum of money varying with the length of his remaining term of service, AR-615-360, pars. 19-23, 14 Sept. 1927) who *voluntarily*

"again enlists"

in the Army (in order to secure certain allowances and other pecuniary benefits) and does *not* relate to one who is, in wartime, *involuntarily "drafted" or*

"inducted"

into the service, as is the situation in the case at bar. Hence the relator's services under his 1944-46 *"induction" must be, and was,* as is evidenced by his "honorable discharge" on June 29, 1946, from

"the military service of the United States,"

credited against any and all subsisting "enlistments" and "inductions."

Respondents' **further** contention (p. 7) that

> "The enlistment from which petitioner deserted would not otherwise have expired until January 25, 1948, because *the Extension of Service Period Act extended its term to six months after the termination of the war* (see Appendix A, *infra,* pp. 18-19)."

is likewise patently unsound, **first,** because said Extension of Service Act did *not* extend such service *until six months after the war in all events,* but, on the contrary,

> *"Provided, that nothing in this section shall be construed to prevent the President from terminating such periods of service, training and service, enlistment, appointment, or commission at an earlier date in any case."* (Emphasis added.)

which proviso *destroys* the respondents' contention be-

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cause the Secretary of War, *by direction of the President,* under the so-called "point system" (RR 1-1), by honorably discharging the relator "from the military service of the United States" "for the convenience of the Government RR 1-1 (Demobilization)", *did "terminate such period of service" at "an earlier date"*, and **second**, were the respondents' said contention to be adopted, the United States Government would have been *without power,* after V-J day, *to reduce the size of its armed forces* and would therefore have been *required* to keep under arms *all* of its millions of soldiers because *all* persons who so served, whether by

"enlistment, appointment, or commission"

were on active duty under substantially the same provisions respecting the *duration* of their service.

As a result of the foregoing, it seems clear that the respondents' conclusion (p. 8) that

> "The combined effect of Articles 28, 107 and 108 accordingly *prohibited* the discharge of petitioner from the earlier enlistment from which he deserted, in the absence of a special order as provided in Article 108,"

is unsupported by and contrary to the actual provisions and effect of the Article of War and pertinent Regulations and the facts of this case.

At pages 8-9, respondents cite and quote certain language from the "Manual for Courts-Martial, United States Army" and certain abstract decisions reflected in the Dig. Op., JAG. This is but an attempt to say that

"It is so because I have said so",

commonly known as

"lifting one's self by one's own bootstraps".

As this Court, in *United States ex. rel. Hirshberg* v.

Cooke, 336 U. S. 210, 69 S. Ct. 530 (1949), with respect to a rather similar contention in a Navy case, recently said:

> "Passing over this argument, however, we are unable to agree that the Navy could in this manner acquire the expanded court-martial jurisdiction it claimed. For we cannot construe 34 U.S.C. § 591, 34 U.S.C.A. § 591, as permitting the Navy to extend its court-martial jurisdiction beyond the limits Congress had fixed. *United States* v. *Symonds*, 120 U. S. 46, 50, 49, 7 S. Ct. 411, 412, 413, 30 L. Ed. 557".

With respect to the **second** portion of our said contention (viz.: *conflict* with the decision of the Ninth Circuit in *Gould* v. *Drainer*, 158 F. 2d 981), the respondents say (pp. 9-10) that

> "the *Drainer* decision is distinguishable"

because

> "The Articles for the Government of the Navy, as distinguished from AW 107, did not make *mandatory* the serving of time lost in desertion, nor did they *prohibit* a discharge prior to the end of a term of enlistment, as is the case under AW 108." (Emphasis added.)

This is *not* so because, as we have previously demonstrated (*ante*, pp. 6-9), *AW 107 did not* actually

> "*make mandatory* the serving of time lost in desertion", (Emphasis added.)

and *AW 108 did not* actually

> "*prohibit* a discharge *prior* to the end of a term of enlistment". (Emphasis added.)

Furthermore, as this Court pointed out in *United States ex rel. Hirshberg* v. *Cooke*, 336 U.S. 210, 69 S. Ct. 530 (1949), were this view to be adopted as correct

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> "there would be left outstanding an Army interpretation of its statutory court-martial powers directly opposed to that of the Navy. Since the Army and Navy court-martial powers depend on substantially the same statutory foundations, the opposing interpretations cannot both be right, unless it be assumed that Congress has left each free to determine its own court-martial boundaries. We cannot assume that Congress intended a delegation of such broad power in an area which so vitally affects the rights and liberties of those who are now, have been, or may be associated with the Nation's armed forces".

Hence the two cases are *not* in fact distinguishable and respondents must fall back on their rather feeble contention (p. 10) that

> "Moreover, the *reasoning* of the decision is *unpersuasive* and ascribes *undue* weight to the remarks of this Court in the only decision cited as authority, *United States* v. *Kelly*, 15 Wall. 34, 36, * * *". (Emphasis added.)

which practically *concedes* that the Court *should* grant certiorari to resolve the conflict.

Insofar as our statement that a failure by this Court to reverse the decision in this case will

> "cause greatest concern on the part of millions of veterans holding such discharges"

is concerned, the respondents apparently have no answer.

II.

THE RELATOR, AFTER HIS SUBSEQUENT CONVICTION BY COURT-MARTIAL OF AN OFFENSE (DESERTION) NOT SO EXCEPTED, BY VIRTUE OF HIS CIVILIAN STATUS WAS NOT REQUIRED, BEFORE SEEKING HIS RELEASE ON A WRIT OF HABEAS CORPUS, FIRST TO "EXHAUST" SUCH "ADMINISTRATIVE REMEDIES" AS MAY BE AVAILABLE TO MILITARY PERSONNEL UNDER ARTICLES OF WAR 47, 50 (e) AND 53;

AND,

IN HOLDING TO THE CONTRARY, THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS IN THIS CASE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT, IN THE RECENT WHELCHEL, GUSIK OR OTHER CASES BEEN, BUT SHOULD BE, AUTHORITATIVELY SETTLED BY THIS COURT BECAUSE OF THE EFFECT OF SUCH A RULING UPON THE RIGHTS AND PRIVILEGES OF MILLIONS OF VETERANS HOLDING SUCH DISCHARGES.

The respondents' desultory answer to the first portion of our said contention is more remarkable for what it *fails* to say than for what it *does* say. For example, it says absolutely *nothing* about the *three* (*Sanantonio*, 265 F. 287; *Viscardi*, 265 F. 695; and *Wilson*, 33 F. 2d 695) cases where lower Federal courts have released honorably discharged servicemen, *not only without requiring them first to "exhaust" any post-conviction "administrative remedies" but without requiring them even to stand trial*, on the ground that, by virtue of such discharges, they had become "*civilians*", no longer subject to trial by courts-martial.

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Although they *do* discuss (under Point I, pp. 10-11) *another* aspect of *United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210, they say absolutely *nothing* concerning the fact that in that case *this* Court, in *reversing* the Second Circuit (and in thus *discharging* the relator who had received an "honorable discharge" prior to his trial by court-martial) did *not* require the relator (as such a civilian) first to exhaust any post conviction "administrative remedies" before seeking his release on a writ of habeas corpus.

In support of their personal conclusion (p. 5) that

> "We think the court of appeals was clearly correct in holding on this record that petitioner's attempt to attack collaterally the jurisdiction of the Army to try him for his 1943 desertion is premature. *Gusik* v. *Schilder*, 340 U. S. 128",

they say (p. 5) that

> "At the time of the decision below, the review by the Board of Review required by AW 50 (e) had not been completed and there had been no final appellate approval of petitioner's conviction and sentence, without which his ultimate sentence could not be executed. It follows *a fortiorari* from the *Gusik* decision, requiring the exhaustion, in addition, of the new remedy by way of a motion for a new trial or other relief provided by AW 53 before recourse may be had to habeas corpus, that petitioner had no standing to attack his conviction."

While it *is* true that the petitioner had not, as of the date his petition for a writ of habeas corpus was filed, "exhausted" such "administrative remedies" as may be available to *military* personnel under the Articles of War, it does *not* follow *a fortiorari* or otherwise, from the *Gusik*, *Whelchel* or other cases, that, as such a *civilian*, his attack upon his conviction was "premature" or that he "had no standing to attack his conviction".

On the contrary, as we pointed out (pp. 30-33) in our original brief, *neither* of these cases involved a veteran who had received an "honorable discharge" prior to his conviction by court-martial; and in *neither* of said cases did this Court pass upon or even discuss the precise question now raised by this petition for certiorari.

After stating (p. 5) that

> "Neither is petitioner in any better standing as of this date,"

respondents proceed (pp. 5-6) to point out **(1)** that the Board of Review did not complete its review of the record of petitioner's trial until October 30, 1950 (when they held it legally sufficient to support the finding and the sentence); **(2)** that although the Judge Advocate General, on October 31, 1950, transmitted such holding to the respondent Chamberlin and "advised him that he was authorized to order the execution of the sentence", no further action has as yet been taken; and **(3)** that the respondent Chamberlin, despite such affirmance by the Board of Review, still has "the power to mitigate, remit, or suspend the whole or any part" of the sentence. To this we add the further fact **(4)** that, although the relator's trial by court-martial ended on July 7, 1949, the respondent Chamberlin did not even take his initial action approving the findings and mitigating the sentence until December 7, 1949 (respondents' memorandum, p. 19), *some five months later.* The respondents also contend (p. 6) that

> "In the absence of a final order by General Chamberlin",

over a year and a half after the conclusion of relator's trial by court-martial,

> "the administrative process under AW 50(e) is incomplete even for the purposes of a motion under

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AW 53. Cf. *Falbo* v. *United States*, 320 U. S. 549, 553-554." (which case, incidentally, involved only a conscientious objector, and had *nothing* whatsoever to do with either "honorably discharged" servicemen or AW 53.)

We submit that all that these dilatory details establish is the soundness of the courts' statements (in *discharging* relators who had received "honorable discharges" *before* their trials by courts-martial) in the *Viscardi* case (265 F. 695), that it recognized

> "the possible dangers to personal liberty involved in the trial of a man in effect a civilian by a military court, at a time when the man is not lawfully in service and a part of the military forces";

and in the *Wilson* case (33 F. 2d 695), that a

> "person so dropped has become by virtue of that fact a civilian, and as such may appeal to the civil court for relief from arrest and trial * * * by a court-martial."

The *real* issue presented by the respondents' said contention is whether, by failing for over a year and a half to complete what are supposed to be entirely "automatic" review procedures, the Army can keep a *civilian* in confinement and *prevent* him from testing its jurisdiction to try him at all *until* the question of his confinement has become *moot*.

We submit that this question *must* be answered in the *negative* if we are to preserve our present system of

"equal justice under law".

Insofar as the **second** portion of our said proposition (viz: that this issue has *not* been, but *should be*, settled by this Court because of the effect of such a ruling upon

the rights and privileges of millions of veterans holding such discharges) is concerned, the respondents apparently have *no* answer.

CONCLUSION.

In view of the foregoing considerations, we respectfully submit that the petition and supporting brief, the respondents' memorandum and this reply *all* affirmatively demonstrate not only **(1)** that there *is* an unresolved *conflict* between the Seventh and Ninth Circuits with respect to Point I, and **(2)** that in the ruling described in Point II, the Seventh Circuit *has* decided an important question of Federal law which has *not* been, but *should be* decided by *this* Court; but that this case presents a situation of such importance to the millions of veterans who hold similar discharges as to call for the exercise by this Court of its power to review the decision of the court below.

We also respectfully submit that it would be highly inappropriate and unfair to all concerned to adopt the respondents' suggestion (p. 13) that this cause merely be remanded to the Court of Appeals

> "with directions to hold it pending reasonable opportunity for completion of the administrative processes".

Either the relator (by virtue of his prior "honorable discharge" from "the military service of the United States" "for the convenience of the Government RR 1-1 (Demobilization)") *was a civilian or he was not;* and *such a civilian either is or is not required first to exhaust such "administrative remedies" as may be available to military personnel under the Articles of War before seeking his release by way of habeas corpus.*

We submit that these clear cut issues, of such importance to all ex-servicemen, should not be sloughed off, and

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thus casually decided against them, through the device suggested by the respondents.

Respectfully submitted,

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